

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

_____	)	
Conservation Law Foundation, Inc.	)	
	)	Case No. 1:15-CV-45-SM
Plaintiff,	)	
	)	
v.	)	<b>PROPOSED CONSENT DECREE</b>
	)	
Hampton River Marina, LLC	)	
	)	
Defendant.	)	
_____	)	

WHEREAS, Plaintiff Conservation Law Foundation, Inc. ("CLF") filed this action on November 26, 2014, against Hampton River Marina, LLC ("Hampton River Marina"), alleging violations of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, and seeking declaratory and injunctive relief, civil penalties, and attorney's fees and costs;

WHEREAS, CLF has alleged that Hampton River Marina owns and operates a water transportation and boat and ship building and repair facility located at 55 Harbor Road, Hampton, NH 03842 (the "Facility");

WHEREAS, CLF has alleged that the Facility discharges industrial stormwater and process water to Hampton Harbor;

WHEREAS, Hampton River Marina has agreed to cease discharging process water to Hampton Harbor;

WHEREAS, Hampton River Marina has agreed to apply for a stormwater discharge permit for the Facility at such time as the regulations are promulgated and applicable permit renewed, reserving the right to seek a conditional exclusion for no exposure from the EPA;

WHEREAS, Hampton River Marina has agreed to develop a Stormwater Pollution Prevention Plan and implement control measures and best management practices in support of its stormwater permit application to be prepared in accordance with the requirements for SIC 4493 (sector Q);

WHEREAS, CLF is a regional, nonprofit environmental organization;

WHEREAS, CLF has alleged, in its complaint (the "Complaint") and in a letter (the "Notice Letter") dated September 24, 2014, sent to Hampton River Marina and others, that

Hampton River Marina has violated and continues to violate Section 505 of the Federal Water Pollution Control Act (“Clean Water Act” “CWA” or “Act”), 33 U.S.C. § 1365(a);

WHEREAS, Hampton River Marina has disputed the allegations in the complaint but has decided that it prefers to implement additional environmentally responsible practices embodied in this Consent Decree in furtherance of its goal of protecting our marine resources, specifically, Hampton Harbor; and

WHEREAS, CLF and Hampton River Marina (the “Parties”) agree that resolution of this matter without further litigation is in the best interest of the Parties and the public, and that entry of this Decree is the most appropriate means of resolving this action.

NOW, THEREFORE, without the trial of any issue of fact or law, without the admission by Hampton River Marina of any of the facts or violations alleged in the Complaint, upon consent of the Parties, and upon consideration of the mutual promises contained herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

### **I. JURISDICTION AND VENUE**

1. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question) and 33 U.S.C. § 1365(a) (Clean Water Act jurisdiction). An actual, justiciable controversy exists between Plaintiff and Hampton River Marina. The requested relief is proper under 28 U.S.C. § 2201, 28 U.S.C. § 2202 and 33 U.S.C. § 1365(a).

2. Venue is properly vested in this Court pursuant to 33 U.S.C. § 1365(c)(1), because the events giving rise to this action occurred at the Hampton River Marina’s Facility, located at 55 Harbor Road, Hampton, NH, and in Hampton Harbor, which are located within this judicial district.

### **II. COMPLIANCE PROGRAM**

3. Hampton River Marina shall not discharge pollutants to waters of the United States from the Facility except in compliance with applicable federal and state statutes, regulations and permits. Until such time as the MSGP is renewed, Hampton River Marina shall conduct its operations consistent with the requirements that it would be obligated to adhere to as if the now expired MSGP was still in effect.

4. Hampton River Marina will develop a written Stormwater Pollution Prevention Plan (“SWPPP”) and shall provide a copy of its SWPPP in electronic format to CLF for review and comment by no later than June 30, 2015. CLF shall respond with comments within twenty-one (21) days of receipt. Within fourteen (14) days of receiving CLF’s comments, if any, Hampton River Marina shall submit a final SWPPP to CLF, incorporating CLF’s comments, or justifying in writing why any comment is not being incorporated. The final SWPPP shall meet the requirements of the most recently issued United States Environmental Protection Agency

(“EPA”) National Pollutant Discharge Elimination System (“NPDES”) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (“MSGP”). The most recent MSGP as of the date of the Parties’ signatures below is the 2008 MSGP, which expired on September 29, 2013. Hampton River Marina will update the SWPPP as necessary to comply with the 2013 MSGP when the 2013 MSGP becomes effective. The MSGP, as it may be updated or reissued from time to time, is incorporated into this Consent Decree by reference. Development of the SWPPP shall include, at minimum, the following steps:

- a. Formation of a pollution prevention team of qualified personnel who will be responsible for preparing the plan and assisting the plant manager in implementing practices to comply with the permit.
  - b. Assessment of potential stormwater pollution sources.
  - c. Selection of appropriate control measures that minimize the discharge of pollutants during storm events for each of these sources.
  - d. Development of procedures for conducting required inspection and monitoring activities, as well as regular maintenance of control measures.
5. Hampton River Marina will post the final SWPPP online and mail a copy to CLF no later than 14 days after the parties reach an agreement on the content of the SWPPP.
6. Hampton River Marina will select, design, install, and implement control measures, in accordance with the MSGP, to meet numeric and non-numeric effluent limits.
7. Hampton River Marina will design, install, and implement control measures that include, at minimum, the following categories of site-specific best management practices (“BMPs”):
- a. Good housekeeping practices,
  - b. Minimizing exposure of potential pollutant sources to precipitation,
  - c. Erosion and sediment control, and
  - d. Management of runoff.
8. Hampton River Marina will design, install, and implement control measures that include, but are not limited to, the sector-specific BMPs listed in the MSGP. Such BMPs shall include the BMPs described in the EPA fact sheet for water transportation facilities, available at [http://www.epa.gov/npdes/pubs/sector\\_q\\_watertransportation.pdf](http://www.epa.gov/npdes/pubs/sector_q_watertransportation.pdf).
9. Hampton River Marina will operate in accordance with the 2008 MSGP and will, within Sixty (60) days of the date that EPA issues a new general permit, submit a complete and accurate Notice of Intent (“NOI”) to the EPA, and send a copy of the NOI to CLF within fourteen (14) days thereof.

### III. MONITORING PROGRAM

10. Hampton River Marina will monitor four (4) times per year at all outfalls/discharge points discharging stormwater associated with industrial activity from the Facility for pollutants identified in the MSGP for the Sector Q (i.e., *ALUMINUM, IRON, LEAD AND ZINC*). The inspections must be performed pursuant to the requirements of the MSGP and include, at a minimum, all areas where industrial activities are exposed to either precipitation or stormwater runoff. Hampton River Marina will send a copy of each inspection and/or sampling result to CLF no later than ten (10) days after receipt.

11. Hampton River Marina will comply with all other monitoring requirements of the MSGP. Hampton River Marina will send a copy of each inspection and/or sampling result to CLF no later than ten (10) days after receipt.

12. Hampton River Marina may take additional samples of its stormwater discharges. If it does so, Hampton River Marina will send a copy of each such inspection and/or sampling result to CLF no later than ten (10) days after receipt.

13. Hampton River Marina will not exceed the sector-specific benchmarks identified in the MSGP for Sector Q (i.e., *ALUMINUM, IRON, LEAD AND ZINC*) after one year from the entry by the Court of this Decree (the day that the Court enters this Decree shall be the "Effective Date").

14. Hampton River Marina shall not discharge process water, including pressure wash water, to waters of the United States unless such a discharge is covered by, and in compliance with the conditions of, an individual NPDES discharge permit.

15. During the life of the Decree, CLF, through representatives, may conduct one (1) yearly site inspection at the Facility. Should such inspection reveal conditions that are non-compliant with the terms of the Consent Decree, an additional site visit may be conducted to assure remedial action has occurred to correct the non-compliance. Any site inspection shall occur with two business days written notice to Hampton River Marina with a copy to Hampton River Marina's counsel via email at [emilejr@bussierelaw.com](mailto:emilejr@bussierelaw.com), during normal business hours and CLF's representatives shall be accompanied by Hampton River Marina's authorized representative during each site visit. During the site inspections, CLF representatives may collect samples of stormwater discharges and take photos at the Facility. CLF shall provide to Hampton River Marina copies of any photographs taken during these site visits and shall not publish any of the photographs taken during these site visits without prior written permission from Hampton River Marina. Any samples taken by CLF shall be split samples with one half of the sample remaining in the possession of Hampton River Marina. CLF will send a copy of each sampling result to Hampton River Marina no later than ten (10) days after receipt.

16. During the life of the Decree, Hampton River Marina shall copy CLF on all documents related to water quality or Clean Water Act compliance regarding the Facility submitted to any government agency including, but not limited to, the EPA, NHDES, and the Town of Hampton. Such documents shall be provided to CLF concurrently as they are sent to the agencies and/or municipalities.

#### **IV. SUPPLEMENTAL ENVIRONMENTAL PROJECT**

17. Within one (1) year of the Effective Date, Hampton River Marina shall make a payment of Ten Thousand Dollars (\$10,000.00) to The Nature Conservancy, earmarked for the Oyster Restoration Program currently conducting operations in Hampton Harbor and Great Bay for environmental restoration of or other environmental benefit to the Hampton River watershed. Hampton River Marina shall notify CLF in writing when the payment is made and provide a copy of the check.

18. For each exceedance of the MSGP benchmarks described in paragraph 13 of this Decree prior to the termination of this Decree as provided for in Paragraph 36, Hampton River Marina shall make an additional payment to The Nature Conservancy in the amount of five hundred dollars (\$500) for environmental restoration of or other environmental benefit to the Hampton River watershed. The parties agree that naturally occurring background compounds set forth in Sector Q of the 2008 MSGP and for Hampton Harbor shall not be considered in the determination of whether benchmarks have been met. Payment of each such additional amount shall be due fourteen (14) days following each exceedance. Hampton River Marina shall notify CLF in writing concurrently each time a payment is made and provide a copy of each check. Payments due from Hampton River Marina under this paragraph shall not exceed three thousand dollars (\$3,000) in any calendar year.

19. For each missed deadline included in this Decree, including but not limited to failures to timely conduct quarterly benchmark monitoring and inspections pursuant to Parts 4 and 6 of the MSGP, but not including missed payment deadlines (discussed in paragraph 25 below), Hampton River Marina will make an additional payment to The Nature Conservancy, in the amount of five hundred dollars (\$500) for environmental restoration of or other environmental benefit to the Hampton River watershed provided however, Hampton River Marina shall not be responsible for additional SEP payments for any missed deadlines during the first year following the Effective Date. Payment of each such additional amount shall be due fourteen (14) days following each missed deadline. Hampton River Marina shall notify CLF in writing concurrently each time a payment is made and provide a copy of each check.

20. For every day that Hampton River Marina discharge process water to waters of the United States without coverage for such discharge under an individual NPDES discharge permit and compliance with the conditions of that individual NPDES discharge permit, Hampton River Marina will make an additional payment to The Nature Conservancy, in the amount of five hundred dollars (\$500) for environmental restoration of or other environmental benefit to the Hampton River watershed. Payment of each such additional amount shall be due fourteen (14) days following each unauthorized process water discharge. Hampton River Marina shall notify CLF in writing concurrently each time a payment is made and provide a copy of each check.

21. None of the SEP payments shall be disbursed to CLF.

22. Within 30 days of the effective date of this Decree, Hampton River Marina shall offer to all of its marina tenants, a free bilge oil absorption device (that shall not contain any emulsifier

or detergent) to be placed in the bilge of the tenants' boats and shall make additional bilge oil absorption devices available to its tenants for purchase. Further, Hampton River Marina shall amend its rules and regulations to require all marina tenants to utilize bilge oil absorption devices that must be changed on or about August 1 of each boating season. Signage shall be installed to advise the marina tenants of this policy and Hampton River Marina shall assure that a recycling disposal container is available on site for the disposal of the bilge oil absorption devices.

- a. On or about November 15, 2016, Hampton River Marina shall advise CLF of the number of bilge oil absorption devices distributed and sold, the percentage number of marina tenants that were found to be compliant with the obligation to maintain a bilge oil absorption device within their bilge and the overall reception they received to the implementation of the policy.

23. By no later than September 30, 2015, Hampton River Marina shall create a rain garden in the non-industrial northwest parking area to mitigate the effects of storm water runoff in any areas identified by their environmental consultant as areas where storm water is sheeting from the northwest parking into Hampton Harbor.

#### **V. LIQUIDATED ATTORNEY FEES AND COSTS**

24. On or before June 30, 2015, Hampton River Marina shall pay to CLF a sum of twenty thousand dollars (\$20,000) in full and complete satisfaction of CLF's fees and costs to date in this matter, including without limitation attorney fees, expert fees, filing fees and other costs.

25. To help defray CLF's reasonably anticipated costs incurred in conducting compliance monitoring and case management during the term of this Decree, Hampton River Marina shall pay CLF an additional sum of five thousand dollars (\$5,000) on or before June 30, 2015.

26. In the event that any payment owed by Hampton River Marina under the Decree is not made on or before the due date, Hampton River Marina shall, in addition to a continued requirement to make said payment, pay to CLF liquidated attorney fees of one hundred dollars (\$100) for each day the payment is late, provided however, that the aggregate late fee for any missed payment shall not exceed one thousand dollars (\$1,000.00) unless Hampton River Marina was noticed in writing that it has failed to make the required payment and thereafter continues to ignore its obligation to make the required payment.

#### **VI. EFFECT OF DECREE**

27. CLF covenants not to sue and releases Hampton River Marina (and its parent corporations, affiliates, subsidiaries, officers, directors, shareholders, employees, agents, and consultants) from any and all claims, causes of action, or liability under Section 505 of the Clean Water Act, 33 U.S.C. § 1365, for damages, penalties, fines, injunctive relief, or any other claim or relief (i) relating to or resulting from noncompliance with the MSGP at the Facility located at 55 Harbor Road, Hampton, NH 03842 occurring prior to the date the Court enters this Decree or (ii) for any past violations alleged in the Complaint.



28. Hampton River Marina releases and discharges CLF, its representatives, assigns, agents, employees, officers, and attorneys, including those who have held positions in the past, from any and all claims, liability, demands, penalties, costs, and causes of action of every nature which concern or are connected with this action.

29. Neither this Decree, nor terms thereof, nor performance of the terms thereunder by Hampton River Marina shall constitute or be construed as an admission or acknowledgment by Hampton River Marina of the factual or legal assertions contained in this Decree or in CLF's Complaint, and Hampton River Marina retains the right to controvert in any subsequent proceedings, other than proceedings for the purpose of implementing or enforcing this Decree, the validity of the facts or determinations contained in this Decree or the Complaint. Neither this Decree, nor terms thereof, nor performance of the terms thereunder, shall constitute or be construed as an admission or acknowledgment by Hampton River Marina of any liability, or an admission of violation of any law, by Hampton River Marina or by its officers, directors, employees, agents, successors, or assigns.

30. CLF does not, by consent to the Decree, warrant or aver in any manner that Hampton River Marina's compliance with this Decree will constitute or result in compliance with federal or state law or regulation. Nothing in this Decree shall be construed to affect or limit in any way the obligation of Hampton River Marina to comply with all federal, state, and local laws and regulations governing any activity required by this Decree.

31. This Decree constitutes the entire agreement among the Parties concerning the subject matter hereof and supersedes all previous correspondence, communications, agreements and understandings, whether oral or written among the Parties.

32. Any notice required or permitted under this Decree shall be in writing and sent to:

For CLF:

Zachary Knox Griefen  
Conservation Law Foundation  
15 East State Street, Suite 4  
Montpelier, VT 05602  
[zgriefen@clf.org](mailto:zgriefen@clf.org)

For Hampton River Marina:

Emile R. Bussiere, Jr.  
15 North Street  
Manchester, NH 03104  
[emilejr@bussierelaw.com](mailto:emilejr@bussierelaw.com)

33. This Decree shall remain in effect if Hampton River Marina relocates the Facility to a different location.

34. Sections I, IV, V, VI, VII, and VIII of this Decree shall remain in effect if Hampton River Marina ceases to be the owner and/or operator of the Facility, regardless of whether the Facility continues to operate or not.

## **VII. REVIEW AND TERM OF DECREE**

35. The Parties recognize that, pursuant to 33 U.S.C. § 1365(c)(3), this Consent Decree cannot be entered until forty-five (45) days after the receipt of a copy of the proposed Consent Decree by the United States Attorney General and the EPA. Therefore, upon signing of this decree by the Parties, CLF shall serve copies of this Decree upon the EPA Administrator, the Regional EPA Administrator, and the Attorney General for review, as required by 40 C.F.R. § 135.5.

36. Upon the expiration of the forty-five-day review period provided by 33 U.S.C. § 1365(c)(3), the Parties will jointly move the Court for entry of this Decree. This Decree shall take effect on the date it is entered by this Court and shall terminate three(3) years from the date of the Decree provided that Hampton River Marina has met its final four (4) consecutive benchmark monitoring requirements in year three (3) with no benchmark exceedences for any monitoring parameter under the last effective MSGP or, the then newly effective MSGP, with the express agreement that naturally occurring background compounds set forth in Sector Q of the 2008 MSGP and for Hampton Harbor shall not be considered in the determination of whether benchmarks have been met. In any event, this Consent Decree shall terminate on the fifth (5<sup>th</sup>) anniversary of the date of this decree.

37. If for any reason the Court should decline to approve this Decree in the form presented, the Parties agree to continue negotiations in good faith in an attempt to cure any objection raised by the Court to entry of this Decree.

## **VIII. MODIFICATION AND ENFORCEMENT OF DECREE**

38. This Decree may be modified only upon written consent of the Parties and the approval of the Court.

39. This Court shall retain jurisdiction over this matter and allow this action to be reopened for the purpose of enabling the Parties to this Decree to apply to the Court for any further order that may be necessary to construe, carry out, enforce compliance and/or resolve any dispute regarding the terms or conditions of this Decree.

40. Counterparts. Facsimile, electronic and scanned signatures shall be deemed to be originals for all purposes. Copies of the original Decree, whether transmitted by facsimile or other means, shall be effective. This Decree may be signed in counterparts.

41. Each person signing this Decree represents and warrants that s/he has been duly authorized to enter into this Decree by the Party on whose behalf it is indicated that the person is signing.



CONSERVATION LAW FOUNDATION

By: 

Christopher M. Kilian

Title: Vice President

Date: 4/28/15

HAMPTON RIVER MARINA, LLC

By: \_\_\_\_\_

Date: \_\_\_\_\_

Ernest J. Thibeault, II

Manager

ENTERED and DATED this \_\_\_\_ day of \_\_\_\_\_, 2015

\_\_\_\_\_  
Honorable Steven J. McAuliffe  
United States District Judge

CONSERVATION LAW FOUNDATION

By: \_\_\_\_\_ Date: \_\_\_\_\_

Christopher M. Kilian

Title: Vice President

HAMPTON RIVER MARINA, LLC

By: \_\_\_\_\_ Date: 4/29/2015

Ernest J. Thibeault, II

Manager

ENTERED and DATED this \_\_\_\_ day of \_\_\_\_\_, 2015

\_\_\_\_\_  
Honorable Steven J. McAuliffe  
United States District Judge